NO. 83-726

In The Supreme Court of the United States

OCTOBER TERM, 1983

FIRST AMERICAN TITLE COMPANY OF SOUTH DAKOTA AND FIRST AMERICAN TITLE INSURANCE COMPANY OF SOUTH DAKOTA,

PETITIONERS,

vs.

SOUTH DAKOTA LAND TITLE ASSOCIATION, SOUTH DAKOTA ABSTRACTERS' BOARD OF EXAMINERS, BLACK HILLS LAND AND ABSTRACT COMPANY, DENNIS O. MURRAY, SECURITY LAND AND ABSTRACT COMPANY, ESTATE OF GLEN M. RHODES, FALL RIVER COUNTY ABSTRACT COMPANY, CHARLES E. CLAY, CUSTER TITLE COMPANY, BETTY J. GOULD, HAAKON COUNTY ABSTRACT COMPANY, KEITH EMERSON, WAYNE ROE, CHARLES NASS, and STATE OF SOUTH DAKOTA,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS SOUTH DAKOTA LAND TITLE ASSOCIATION, FALL RIVER COUNTY ABSTRACT COMPANY, CHARLES E. CLAY, CUSTER TITLE COMPANY, BETTY J. GOULD, HAAKON COUNTY ABSTRACT COMPANY, KEITH EMERSON, WAYNE ROE, AND CHARLES NASS BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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STATE PUBLISHING COMPANY, PIERRE, SD 57501

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OPINIONS BELOW

The Court of Appeals decision has not yet been reported in the Federal Reporter, but it does appear at 1983-2 Trade Reg. Rep. (CCH) ¶ 65,539 (8th Cir. 1983). The opinion of the District Court is reported at 541 F. Supp. 1147 (D.S.D. 1982), 1982-2 Trade Reg. Rep. (CCH) ¶ 64,849.

JURISDICTION

The judgment of the Court of Appeals was entered on August 11, 1983. Juridiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Sherman Act, Act of July 2, 1890, c. 647, 26 Stat. 209, as amended:

Section 1 (15 U.S.C. §1):

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

Section 2 (15 U.S.C. §2):

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . . .

SDCL §58-25-16:

No insurance company shall issue any policy of title insurance or certificate of title or other guarantee of title, covering any property located within the State of South Dakota, unless the same is countersigned by a person, partnership or corporation who has met the requirements of §36-13-8 and 36-13-10 in the county in which the real property is located, or maintains an abstract plant in the county where the real property is located and meets the requirements of Chapter 36-13. A violation of this section is a Class 2 Misdemeanor.

SDCL §36-13-26.1:

An abstracter's countersignature on a title insurance policy is verification that the abstracter has furnished the insurer a report based on the examination or record title and any other title information and services required by the insurer and §36-13-25.

SDCL §1-26-4:

The following procedure shall be complied with prior to the adoption, amendment, or repeal of any rule, except an emergency rule:

(1) An agency shall serve a copy of a proposed rule and any publication described in § 1-26-6.6 upon the departmental secretary, bureau commissioner or constitutional officer of the department to which it is attached;

(2) Fifteen days after the service required by subdivision (1) or upon receiving the written approval of such officer to proceed, whichever comes first, and

twenty days prior to the hearing, the agency shall serve the attorney general and the code counsel with a copy of the proposed rules, a copy of any publication described in § 1-26-6.6, a copy of the fiscal note described in § 1-26-4.2 and a copy of the notice of hearing required by § 1-26-4.1. Also, twenty days prior to the hearing, the agency shall serve the bureau of finance and management with a copy of the proposed rules, a copy of the fiscal note described in § 1-26-4.2 and a copy of the notice of hearing required by § 1-26-4.1;

(3) The agency shall publish the notice of hearing in the manner prescribed by §1-26-4.1, at least twenty days prior to the hearing;

(4) The agency shall afford all interested persons reasonable opportunity to submit data, opinions, or arguments, either orally or in writing or both at a hearing held for that purpose. The hearing may be continued from time to time until its business has been completed. The agency shall keep minutes of the hearing. A majority of the members of any board or commission authorized to pass rules must be present during the course of the hearing required by this subdivision;

(5) After the hearing, the agency shall fully consider all written and oral submissions regarding the proposed rule. A proposed rule may be modified or amended at this time to include or exclude matters which were described in the notice of hearing;

(6) The agency shall make any corrections required by the attorney general or code counsel; and

(7) The agency shall serve the minutes of the hearing and a corrected copy of the rules on the members of the interim rules review committee.

The time periods specified in this section may be extended by the agency.

SDCL §1-26-38:

The interim rules review committee may, by an affirmative vote of not less than three-fourths of the members of the committee suspend provisional rules or rules which have not become effective. To suspend a rule, the committee shall:

(1) Give the agency which promulgated the rule at least two weeks notice of a hearing on the proposed suspension;

(2) Hold a hearing, which may be in conjunction with a regular committee meeting. At the hearing, the burden of proof that the rule is necessary and does not violate any constitutional or statutory provision or the legislative intent when authority to promulgate the rule was given, is on the agency;

(3) File an appropriate resolution of such action with the secretary of state.

The suspension is effective from the date of such filing. A suspended rule shall remain suspended until July first of the year following the year in which it became, or would have become, effective, and may not be enforced during that period.

STATEMENT OF THE CASE

First American Title Company of South Dakota, Petitioner herein, is a South Dakota corporation engaged in the land abstracting and title insurance business and licensed by the State of South Dakota to pursue this business in Pennington County. Appellant First American Title Insurance Company of South Dakota is a defunct corporation formed by Petitioners for the purpose of writing title insurance on a multiple county if not statewide basis. Petitioner Title Insurance Company was organized for the purpose of taking advantage of a "loophole" in South Dakota law which at the time of the organization of the company allowed a domestic title insurance company to write title insurance without the countersignature of a licensed abstracter.[1] Action of the South Dakota Legislature both in 1979 and 1980 closed the "loophole" by amending the South Dakota statute which allowed domestic title insurance companies to write title policies without the services of a licensed abstracter.[2] Petitioner title insurance company was dissolved prior to the commencement of this present action when its organizers determined that they would no longer have a competitive advantage in the title insurance business in South Dakota.

1

TR 271 & 272. Testimony of Walter J. Linderman, President of First American Title Insurance Company of South Dakota.

2

At the time First American Title Insurance Company was established in 1978 SDCL §58-25-16 provided: "No foreign insurance company shall issue any policy of title insurance or certificate of title or other guarantee of title, covering any property located within the state of South Dakota, unless the same is countersigned by a person, partnership or corporation, who has met the requirements of §§ 36-13-8 and 36-13-10. Violation of this sec-

South Dakota has historically regulated the business of abstracting and insuring land titles. SDCL §36-13 and §58-25. As authorized by statute the South Dakota Board of Abstracters Examiners has adopted rules and regulations over a number of years which further govern the business of abstracting and title insuring in the State of South Dakota.

A.

PETITIONERS' ATTACK ON THE ABSTRACTING INDUSTRY IN SOUTH DAKOTA

Plaintiffs in this action have from its commencement launched a broad attack against the land title abstracting and title insurance industry in South Dakota. In their complaint they alleged that Defendants have: (a) Conspired to fix the price to Plaintiffs of abstracters' countersignatures on title insurance policies at 50% of title insurance premiums; (b) engage in frivolous, groundless and sham litigation directed against Plaintiffs; (c) engage in efforts to influence the enactment of legislation as part of a larger scheme to monopolize

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tion is a Class 2 misdemeanor". The 1979 Amendments to SDCL § 58-25-16 struck the word "foreign" from the first line of the statute. The 1980 amendment to SDCL §58-25-16 changed the language of the statute to read as follows: "No insurance company shall issue any policy of title insurance or certificate of title or other guarantee of title, covering any property located within the State of South Dakota unless the same is countersigned by a person, partnership or corporation who has met the requirements of § 36-13-8 and 36-13-10 in the county in which the real property is located, or maintains an abstract plant in the county where the real property is located and meets the requirements of Chapter 36-13. A violation of this section is a Class 2 misdemeanor". In addition, a new statute was added "SDCL 36-13-26.1".

and restrain trade in the business of providing title services; (d) enforce and attempt to enforce various statutes and regulations which govern the abstracting and title insurance business in the State of South Dakota; (e) engage in a publicity campaign directed against Plaintiffs which was a mere sham to cover an attempt to interfere directly with the business relationships of the Plaintiff. Throughout the litigation process these claims of Plaintiff have been rejected by both the trial court and the Eighth Circuit Court of Appeals. However, Petitioner's sole contention for purposes of this petition is that three regulations of the South Dakota Abstracters Board of Examiners should be declared violative of the Sherman Act, 15 U.S.C. §1 and 2.[3] This particular allegation is aimed primarily at the South Dakota Abstracters Board of Examiners and the State of South Dakota since none of the other named defendants have the authority to enforce state statutes or administrative rules and regulations of the State of South Dakota.

3

ARSD § 20:36:07:02.

Title search requirements.

The title search required for a commitment for or policy of title insurance shall be made under the direction of an abstracter licensed in the county in which the property is located, who shall countersign the title insurance policy pursuant to SDCL 58-25-16.

The results of the search shall be forwarded to the agent or company that is to issue the policy in the same order of business as is normally conducted by the abstracter. Delays in the search or reporting shall be cause for complaint and disciplinary proceedings by the abstracters' board of examiners.

ARSD § 20-36-07:01.

Title search required for countersignature.

An abstracter shall search the records contained in the abstracter's plant and in the courthouse which relate to the prop-

B.

REGULATIONS OF THE LAND TITLE INDUSTRY

The State of South Dakota has historically undertaken a broad and pervasive regulation of the land title industry within the State of South Dakota. SDCL §36-13 provides a series of comprehensive statutes which act to regulate the abstracting business in the State of South Dakota. Among those statutes is SDCL §36-13-10 which requires that each licensed abstracter within the state maintain an abstract plant within the county of his license. This series of statutes also gives the South Dakota Abstracters Board of Examiners authority to adopt rules and regulations for purposes of carrying out the enforcement authority of the board. Also contributing to the framework of the regulation

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erty being insured before he countersigns a policy of or commitment for title insurance pursuant to SDCL 58-25-16.

ARSD § 20:36:04:01.

General requirement for books, records, and indexes.

Before any person, firm, or corporation shall be entitled to a certificate of registration to engage in abstracting under the laws of South Dakota, he shall have an approved abstract plant containing the following:

(1) A complete index showing every instrument recorded in the register of deeds office in the county wherein he proposes to operate, properly listed against the specific property which it affects, and also a separate index showing all recorded instruments which do not affect specific property. This index may be compiled on cards, in bound books, or in loose leaf form, but must be made from an actual check of each page of each book of recorded instruments in said office, and in no case will a copy or film of the numerical index in the register's office be accepted.

of the abstracting industry in South Dakota is SDCL §58-25-16 which provides that a title insurance policy issued in the State of South Dakota must be countersigned by an abstracter licensed in the county within which the policy is issued and SDCL §36-13-26.1 which provides that an abstracter's countersignature on a title insurance policy is verification that the abstracter has conducted a title search to determine the state of the record title.

Of the three regulations complained of by Petitioners, ARSD § 20:36:04:01 which provides that a licensed abstracter must create his abstract plant by an actual examination of the documents in the Register of Deeds office is of long standing. The other two regulations ARSD § 20:36:07:01 and § 20:36:07:02 are recent regulations which were adopted after the passage of the 1980 legislation embodied in SDCL § 36-13-26.1. With regard to each of these regulations the trial court and the Eighth Circuit Court of Appeals found that the State of South Dakota at trial had justified the reason for the existence for these enactments by introducing evidence which indicated the poor or even illegible condition of the official records of many counties. The abstract plant thus acts as a method of preserving county records which might otherwise be lost as well as providing a double check method of verifying the accuracy of official records which are illegible or in error.

This particular manner of regulation is the basis of Petitioner's Complaint. At trial in this cause Petitioners presented the testimony of the Insurance Commission from the State of Colorado who testified over objection that the countersignature requirement on title insurance policies (and thus indirectly the three regulations complained of) was not necessary for an effec-

tive scheme of regulation. This witness then indicated that Colorado did not have such a requirement. Interestingly enough further testimony revealed that the loss to premium ratio in Colorado in 1980 was nine percent (9%) while in South Dakota, the loss to premium ratio historically is about two-tenths of one percent (.2%). South Dakota has chosen a scheme of regulation of the abstracting industry and of the title insurance industry which protects the consumer by isolating title defects before a title transaction is completed. Petitioners allege that they cannot compete with this scheme of regulation because of the cost of establishing an abstract plant. Yet as the Eighth Circuit Court of Appeals pointed out, in 1973 Walter J. Linderman who founded Petitioner First American Title Company of South Dakota was able to fulfill the abstract plant requirement and thus compete on equal footing with the other licensed abstracter in Pennington County.

C.

PETITIONERS ALLEGED DILEMMA

Petitioners allege that they were in some manner prohibited from countersigning title insurance policies in the State of South Dakota by reason of the 1978 amendment to SDCL § 58-25-16 and the 1980 enactment of SDCL § 36-13-26.1. Respondents contend that Petitioners have not been prohibited from pursuing their business interest, but have only been required to compete on equal footing with licensed abstracters in the counties within which they would desire to write title insurance. The South Dakota Legislature simply determined that title insurance must be written by reference to a title search and that all people offering that title search must be properly licensed by the State of

South Dakota. Petitioners alleged dilemma is simply that they no longer have the competitive advantage that existed by virtue of a "loophole" in South Dakota statute prior to the 1979 and 1980 statutory enactments.

ARGUMENT

South Dakota has adopted a regulatory system in the area of title insurance which is restrictive but effective. A provision of that regulatory scheme not directly related to the issues in this case was challenged in 1974. The South Dakota Supreme Court in the case of *Siefkes v. Clark Title Co.*, 215 NW 2d 648, 652 (S.D. 1974) described the abstracting industry in South Dakota in the following language:

> Because the abstracters' product is an indispensable part of real property transfers and due to the reliance which must necessarily be placed upon it by the vendor and vendee alike, the legislature has properly exercised its police power by the enactment of Ch. 36-13 (Abstracters of Title). It is evident that there does exist a real and substantial relation between the regulatory means adopted in regard to price regulation and the actual or manifest evil possible due to the monopolistic nature of the business.

Thus the regulatory scheme which South Dakota has adopted has its framework in statute which the South Dakota Supreme Court has recognized as necessary to protect consumers. These statutes contain properly delegated rule making authority to the South Dakota Abstracters Board of Examiners.

Under South Dakota law a strict procedure is set

forth for the adoption of administrative rules and regulations which also includes legislative supervision and control. SDCL § 1-26-4. Pursuant to SDCL § 1-26-1.1 an Interim Rules Review Committee is created to consist of six (6) legislators of whom no more than four (4) can be from the same political party. SDCL § 1-26-38 gives this Interim Rules Committee the authority to suspend any proposed rules of any administrative agency upon review.

It is this scheme of regulation that Petitioners allege fails to meet the two-prong test first established by this court in the case of *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, (1980). The *Midcal* case establishes two standards for antitrust immunity under the rationale of *Parker v. Brown* 317 U.S. 341 (1943). The first standard is that the challenged restraint must be one clearly articulated and affirmatively expressed as state policy, while the second standard is that the policy must be actively supervised by the state itself.

South Dakota's regulatory scheme does not as argued by Petitioners indicate preference that holders of property use the services of abstracters over title insurers. Instead, the legislatively mandated scheme of regulation requires a valid, supervised attempt to locate and isolate title defects before a title transfer is consummated. While this may not be the same scheme of regulation that is followed in Colorado it is none the less a clearly articulated and affirmatively expressed policy of the state of South Dakota. It is set forth in a statutory scheme of regulation that is implemented by legislatively supervised and controlled rule making powers of the South Dakota Abstracters Board of Examiners.

This court has ruled that state agencies simply because of their relationship with the sovereign state do not necessarily qualify as the state acting in its sovereign capacity. *City of Lafayette v. Louisiana Power and Light Company*, 435 U.S. 389 (1978). While that type of contention may be before the court in the case of *Ronwin v. State Bar of Arizona*, 686 F.2d 692 (9th Cir. 1981), cert. granted sub nom, *Hoover v. Ronwin*, 103 S. Ct. 2084, 77 L.Ed. 2d 296 (1983) such contention is simply unfounded in this case. Both the trial court and the Eighth Circuit Court of Appeals found that the regulatory scheme including the implementation of the challenged portions thereof reflect a clearly articulated and affirmatively expressed state policy to substitute regulation in lieu of unfettered competition.

Petitioners have asked that this case be made a companion case to *Rowin v. State Bar of Arizona*, supra. Petitioners' argument appear to be that any regulatory scheme by a state to avoid review under the Sherman Act must be totally legislatively enacted. In the *Ronwin* case the question involved the propriety of the grading process used by the committee on examinations and admissions of the Arizona Supreme Court. The facts disclosed that the committee was established by the court and the court selected its members. However, there was a factual dispute regarding what type of grading formula was actually used by the committee and if the Arizona Supreme Court was even aware of the nature of the grading formula used by the committee. The Ninth Circuit Court of Appeals in that case stated:

> The national policy in favor of competition, *Midcal*, 445 U.S. at 106, 100 S.Ct. at 93, should not be thwarted absent a clear articulation by the Arizona

Supreme Court that it had adopted the alleged grading policy.

The situation in *Ronwin* should be contrasted with the situation in this case where the Administrative Rules complained of were first of all authorized by legislative enactment and then adopted after a formal administrative process which included public review and review by a legislative committee with full authority to suspend adoption of the rules.

The Eighth Circuit Court of Appeals in its decision in this case stated as follows:

> South Dakota by statute requires that an abstracter maintain an abstract plant 'showing in a sufficiently comprehensive form, all instruments affecting the title to real estate which are of record or on file in the office of the register of deeds....' SDCL §36-13-10. The Board of Examiners in turn sets out by regulation precisely what constitutes 'sufficiently comprehensive form' for an abstract plant in ARSD §20:36:04:01. South Dakota also requires by statute that an abstracter maintain a set of records for 'each county wherein such person seeks to engage in compiling abstractive land titles....' SDCL §36-13-10. In addition, SDCL §36-13-26.1 requires the abstracter to examine record title and furnish a report to the title insurer before countersigning the title insurance policy. The Board of Examiners in turn sets out that the 'examination of record title' required by SDCL §36-13-26.1 must include an examination of both the abstracters' abstract plant and the official county records. ARSD §20:36:07:01. The board also requires that the search pursuant to the countersignature requirement be made 'under the direction of

an abstracter licensed in the county in which the property is located,' ARSD §20:36:07:02, to insure that the search is not improperly delegated to one who has not met requirements for becoming a licensed abstracter. Clearly the statutory provisions which govern the business of abstracting indicate that the challenged regulations of the Board of Examiners are the kind of action contemplated by the South Dakota Legislature. (See Petitioners' Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, Appendix A, pages Appendix 31 and 32.)

Certainly as shown in the analysis of the Eighth Circuit Court of Appeals the administrative rules complained of are part of the legislatively imposed scheme of regulation. These regulations are also legislatively mandated and legislatively approved contrary to the situation in *Ronwin*. The situation in this case is not analagous to *Ronwin*, supra, and it would merely confuse the issues to include this case as a companion for hearing.

In any event the Eighth Circuit Court of Appeals decided this case upon the theory of *Rice v. Norman Williams Co.*, _____ U.S. _____, 102 S.Ct. 3294, 73 L.Ed. 2d 1042 (1982). The court found no irreconcilable conflict between South Dakota's regulatory scheme and the Sherman Act. Absent a showing of such irreconcilable conflict the court found no federal preemption. Clearly in this regard the present action is distinguishable from *Ronwin*, supra.

CONCLUSION

Petitioners have not shown a sufficient identity of is-

sues to make this case a viable companion case to *Ronwin v. State Bar of Arizona*, supra. Petitioners' allegations have been properly rejected by the trial court and the Eighth Circuit Court of Appeals and certiorari would not be appropriate in this case.

Dated December 9, 1983.

Respectfully submitted,

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